

**BEFORE THE FEDERAL COMMUNICATIONS COMMISSION**

In re: Domestic Section 214 Application Filed For :  
Assignment of Assets of IDS Telcom, LLC to IDS :  
Telcom Corp. :

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WC Docket No. 05-70  
Date: March 14, 2005

**COMMENT OPPOSING APPLICATION**

PHYLLIS HEIFFER ("Heiffer"), by and through her undersigned counsel, files this Comment opposing the Application by IDS Telcom Corp. ("New IDS") and IDS Telcom LLC ("Old IDS") requesting authority for Old IDS to assign all of its assets, including its domestic section 214 authorizations, to New IDS.

**Name and Address of Person Submitting Comment and Her Representative:**

1. The name, address and telephone number of the person submitting this Comment is Phyllis Heiffer, 3301 N.E. 5<sup>th</sup> Avenue, Apt. 1117, Miami, FL 33137, (305) 576-2199.

2. The name, address and telephone number of Phyllis Heiffer's Representative is John M. Cooney, Esquire, Broad and Cassel, One Financial Plaza, Suite 2700, Fort Lauderdale, Florida 33394 (954) 764-7060.

**Background:**

3. The applicants' request for authority to assign assets from Old IDS to New IDS is opposed for the following reasons:

- a. Phyllis Heiffer ("Heiffer") is a former National Account Manager of Old IDS. After first hiring Heiffer and obtaining her extensive book of business, Old IDS terminated Heiffer on December 28, 2001. On January 10, 2002, Old IDS (through its counsel) sent Heiffer a threatening cease and desist letter [attached hereto as Exhibit 1], and began to aggressively pursue Heiffer in an attempt to

shut her out of the telecommunications sales business entirely, and capture her book of business, through enforcement of a so-called “non-competition/nonsolicitation” provision of her employment agreement. Old IDS’s conduct was contrived, pre-meditated and with malicious intent, as the management of Old IDS *knew* that Old IDS had no non-compete agreement whatsoever in Heiffer’s Employment Agreement. Old IDS also knew that it did not have an enforceable non-solicitation agreement unless and until there was a transfer of assets from Old IDS to a new entity and Heiffer was paid her deferred compensation bonus. After vigorous litigation, including two appeals initiated by Old IDS, and a jury trial, the Judge in the case determined that the so-called “non-competition/nonsolicitation” provision that Old IDS sought to enforce was not a non-compete at all, and the non-solicitation provision was entirely unenforceable as a matter of law. As a result of that litigation, Phyllis Heiffer obtained a permanent injunction which was issued by a Florida court of competent jurisdiction and **which permanently restricts Old IDS from engaging in certain enumerated competitive business practices affecting certain telecommunications customers.** [See Exhibit 2, attached hereto, at par. 3.]

- b. Phyllis Heiffer is a “creditor” of Old IDS, as defined in Florida’s Uniform Fraudulent Transfer Act, Florida Statute § 726.101, et seq., and other provisions of Florida law. Heiffer has been adjudicated the prevailing party in the action by Old IDS to seek enforcement of the so-called non-competition/nonsolicitation provision which resulted in Heiffer obtaining her permanent injunction against Old IDS. Heiffer has an unliquidated, disputed claim against Old IDS for the

legal fees that she was forced to expend in defeating the claims brought against her by Old IDS. These legal fees total over \$450,000.00. The amount of these legal fees which Heiffer is entitled to recover from Old IDS will be determined at a judicial proceeding to be held in April or May 2005.

- c. Additionally, upon the transfer of assets from Old IDS to New IDS, and within fifteen (15) days there from, Old IDS or its successor is contractually obligated to pay Heiffer, as deferred compensation and in recognition of her past and valuable services to Old IDS, an amount valued at \$253,395.33. Old IDS has acknowledged in open court its duty to pay Heiffer *when and if a transfer of its Assets to a new entity ever occurs*, but has made no provision for such payment to Heiffer despite the current application for a transfer of Assets from Old IDS to New IDS.
- d. Old IDS and New IDS have entered into an Asset Purchase Agreement whereby New IDS has agreed to purchase all of the Assets of Old IDS. As a result of the proposed transaction, Old IDS's Assets, including all of Old IDS's operations and customers, will be transferred and Old IDS's Florida certifications will be assigned to New IDS, a newly created, wholly-owned direct subsidiary of Cleartel Communications, Inc., which is indirectly owned by MCG. Neither MCG (the ultimate Buyer), New IDS, nor Old IDS have provided sufficient assurances that Creditors, like Phyllis Heiffer, will be paid following the asset transfer, or that Old IDS will not be left insolvent to satisfy these claims. This raises an issue as to whether or not Old IDS is seeking to transfer its business to New IDS in order

to hinder, delay or defraud Phyllis Heiffer in satisfying her claims, and in violation of Florida Statute §726.104.

- e. Neither New IDS nor Old IDS have provided any assurances that the enjoined behavior of Old IDS won't be repeated by New IDS. New IDS will continue to have access to the management team of Old IDS, whose bad conduct resulted in the permanent injunction against Old IDS, and the transfer of business from Old IDS to New IDS could be used to avoid the business practice restrictions that have been permanently imposed on Old IDS by a Florida court.
- f. The managerial capacity and quality of New IDS is suspect due to the integration of the management team of Old IDS who have demonstrated a disregard of their financial and contractual obligations to former employees and creditors, and whose past conduct has resulted in a permanent injunction against Old IDS.

**Comment:**

4. The proposed transaction will not serve the public interest because New IDS, and Old IDS have failed to make provisions for payment to creditors of Old IDS upon the transfer of the assets from Old IDS to New IDS, especially where such transfer of assets specifically *triggers* payments to former and current employees of Old IDS, and where no assurances have been made that Old IDS will have sufficient assets to satisfy the claims of creditors of Old IDS.

5. The proposed transaction will not serve the public interest because New IDS will continue to have access to the management team of Old IDS, whose conduct resulted in the permanent injunction prohibiting certain competitive business practices against Old IDS, and the transfer of certificates from Old IDS to New IDS could be used to avoid the business practice restrictions that have been permanently imposed on Old IDS by a Florida court.

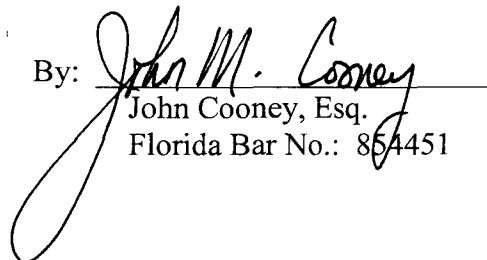
6. The proposed transaction will not serve the public interest because the proposed transfer of assets may have been made with the intent to hinder, delay or defraud creditors, like Heiffer, in satisfying their claims, in violation of Florida Statutes §726.104, and/or to avoid the business practice restrictions permanently imposed on Old IDS.

7. Phyllis Heiffer claims that the transfer of domestic section 214 authorizations will not be in the public interest and therefore must be denied. Specifically, the transfer is not in the public interest because: it makes no provision for the payment of Old IDS' creditors upon transfer; it makes no provision for the payment of deferred compensation bonuses to former and current employees of Old IDS that is specifically triggered by the transfer of assets from Old IDS to New IDS; it unfairly and unlawfully avoids the permanent injunction issued against Old IDS by a Florida court; and it may be an unlawful transfer of assets from Old IDS to New IDS in violation of Florida's Uniform Fraudulent Transfer Act.

Respectfully submitted,

BROAD AND CASSEL  
Counsel for Phyllis Heiffer  
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Telephone: (954) 764-7060  
Facsimile: (954) 713-8135  
[jcooney@broadandcassel.com](mailto:jcooney@broadandcassel.com)

By:

  
John Cooney, Esq.  
Florida Bar No.: 854451

## **Exhibit 1**

LAW OFFICES  
STEARNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON, P.A.

MUSEUM TOWER  
150 WEST FLAGLER STREET  
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FT. LAUDERDALE OFFICE  
SUITE 1900  
200 EAST BROWARD BOULEVARD  
FORT LAUDERDALE, FLORIDA 33301  
(954) 462-9500

January 10, 2002

*Via Facsimile Transmission (305-576-0545)  
and Overnight Delivery*

Phyllis Heiffer  
3301 N.E. 5<sup>th</sup> Ave., Apt. 1117  
Miami, FL 33137

Re: Tortious Interference with Business Relations and Violation  
of your Restrictive Covenants pursuant to IDS Employment Agreement

Dear Ms. Heiffer:

It has come to the attention of IDS that you have been violating the terms of your IDS Employment Agreement and further have been engaging in conduct which constitutes tortious interference with business relations. More specifically, we have information that you have been communicating with customers of IDS and advising them against doing business with IDS. Such conduct plainly violates your valid and binding obligation in Section 9 of your Employment Agreement to use your best efforts to ensure that customers of IDS remain with IDS for the 12-month non-compete period following your termination. In addition, your conduct is intentional, tortious, and wrongful interference with IDS's business relationships without legal justification. Because your conduct appears to be wanton, willful, and malicious, we have a reasonable expectation of obtaining punitive damages against you.

If we do not receive from you by close of business Monday, January 14, 2002, (1) a written assurance that you are not and will not be communicating in any manner with any IDS customers or prospective customers, and (2) a list of customers or prospective customers, including the contact person at those customers or prospective customers, that you have had contact or communication with since December 27, 2001, specifying the nature of your contact or communication, we will bring an action for injunction and damages against you to protect the lawful interests of IDS. In such case you may be enjoined by the court enforceable through contempt of court, and may also be liable for damages, punitive damages, court costs and attorney's fees.

Very truly yours,



Joan M. Canny

Enclosure

cc: Robert H. Hacker

## **Exhibit 2**



IN THE CIRCUIT COURT OF THE 17<sup>th</sup>  
JUDICIAL CIRCUIT IN AND FOR  
BROWARD COUNTY, FLORIDA

PHYLLIS HEIFFER,

Plaintiff,

CASE NO: 02-00749 CACE 14

v.

IDS LONG DISTANCE, INC., a Florida corporation,  
IDS TELCOM, a Florida General Partnership, IDS  
TELCOM LLC, a Florida limited liability company,  
and JOHN DOE, individually,

Defendants.

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IDS LONG DISTANCE, INC., a Florida corporation,  
IDS TELCOM LLC, a Florida limited liability  
company,

Plaintiffs,

v.

PHYLLIS HEIFFER, TELECOMSMART.COM.,  
INC., a Florida corporation, and TERESA  
GROSSO, an individual,

Defendants.

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**FINAL JUDGMENT**

THIS CAUSE having come on for jury trial before this Court commencing on May 24, 2004, and concluding on May 27, 2004, related to those matters raised in this Cause as between and among Plaintiff, PHYLLIS HEIFFER ("Heiffer"), whose address is 3301 N.E. 5th Avenue, Apt. 1117, Miami, FL 33137; and Defendants, IDS LONG DISTANCE, INC., a Florida corporation, IDS TELCOM, a Florida General Partnership, and IDS TELCOM LLC, a Florida limited liability company (collectively, the "IDS parties"), whose address is 1525 N.W. 167th Street, Suite 200, Miami, Florida 33169; and pursuant to directed verdicts rendered by the Court at the close of all of the evidence in the case, and also pursuant to voluntary dismissals of certain claims by the parties, this Court orders, adjudges and finds as follows:

1. Based upon the evidence that was presented at trial, the Court finds that the Non-Solicitation provision of Section 9 of the Employment Agreement (Plaintiff's Exhibit 1) is unenforceable as a matter of law. Therefore, on the claim by the IDS parties to enforce the Non-Solicitation provision (Count I of IDS' Second Amended Complaint), the Court directs a verdict in favor of Phyllis Heiffer and against the IDS parties. Judgment is hereby entered in favor of Phyllis Heiffer and against the IDS parties on Count I of the IDS parties' Second Amended Complaint who shall take nothing on their claim.

2. Based upon the evidence that was presented at trial, the Court finds that a "change of control" as defined in the Employment Agreement (Plaintiff's Exhibit 1) did not occur. On the claim by Phyllis Heiffer for deferred compensation (Count I of Heiffer's Second Amended Complaint), the Court directs a verdict in favor of the IDS parties and against Phyllis Heiffer. Judgment is hereby entered in favor of the IDS parties and against Phyllis Heiffer on Count I of Phyllis Heiffer's Second Amended Complaint who shall take nothing on this claim.

3. Based upon the Court's ruling in Paragraph 1, above, and based on the evidence presented at trial, the Court finds that with respect to Count V of Phyllis Heiffer's Second Amended Complaint for injunctive relief, Phyllis Heiffer is entitled to permanent injunctive relief. Accordingly, the IDS parties are hereby enjoined from oral or written communication which conveys any impression that Phyllis Heiffer is restricted in her employment by any enforceable restrictive covenants with the IDS parties; from disconnecting the local and long distance service of any customers who elect to follow Phyllis Heiffer from IDS Telcom LLC to another carrier, and from changing the long distance carrier codes and freezing accounts of any customers who have elected to follow Phyllis Heiffer from IDS Telcom LLC to another carrier; and from otherwise interfering in any way with Phyllis Heiffer's business relationships, her

ability to solicit any customers for telecommunications services, and her future employment opportunities. This injunction shall not preclude IDS from competing in the industry with Phyllis Heiffer.

4. On Count VI of Heiffer's Second Amended Complaint alleging intentional infliction of emotional distress against the IDS parties, the Court notes that Phyllis Heiffer voluntarily dismissed this claim, without prejudice, on or about January 22, 2004, during the discovery phase of this case.

5. On Count IV of IDS' Second Amended Complaint alleging misappropriation of trade secrets against Phyllis Heiffer, the Court notes that the IDS parties voluntarily dismissed this claim, without prejudice, on or about May 19, 2004, after the discovery cut-off in this case (but prior to trial).

6. On Counts II and IV of Heiffer's Second Amended Complaint for unpaid commissions against the IDS parties, the Court notes that Phyllis Heiffer voluntarily dismissed these claims, without prejudice, on or about May 20, 2004. The claim by Phyllis Heiffer for deferred compensation is not encompassed in the dismissal of Counts II and IV.

7. On Count III of Heiffer's Second Amended Complaint for breach of Florida's Whistleblower's Act against IDS Telcom LLC, the Court acknowledges that Phyllis Heiffer voluntarily dismissed this claim, without prejudice, on or about May 24, 2004 on the first day of trial.

8. On Count III of IDS' Second Amended Complaint for breach of tortious interference against Phyllis Heiffer, the Court acknowledges that the IDS parties voluntarily dismissed this claim, without prejudice, on or about May 27, 2004 on the last day of trial.

9. On Counts V and VI of IDS' Second Amended Complaint for conversion and civil theft against Phyllis Heiffer, the Court acknowledges that the IDS parties voluntarily dismissed these claims, without prejudice, on or about May 27, 2004 on the last day of trial.

10. All claims that were voluntarily withdrawn by the parties hereto are deemed dismissed with prejudice.

11. The Court further reserves and retains jurisdiction to determine entitlement and amount of attorneys' fees and legally taxable costs, and to consider any post-trial motions.

DONE, ORDERED AND ADJUDGED in Chambers at Fort Lauderdale, Florida,

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~~DEPT. CLERK~~ JUL 14 2004  
THE CLERK

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CIRCUIT COURT JUDGE

Copies furnished to:

Franklin L. Zemel, Esquire – Broad and Cassel  
Mitchell L. Feldman, Esquire – Silver, Levy & Feldman

### **Exhibit 3**



Dear Valued IDS Customers,

We are pleased to announce an asset purchase agreement between IDS Telecom, LLC and IDS Telecom Corp., a Cleartel Communications company. This agreement will become effective and IDS Telecom Corp. will become your service provider on or about March 31, 2005.

During the past twelve months we've worked hard to create new product offerings and streamline provisioning and customer service processes. The end result is a stronger communications company to serve you better.

There are several assurances we want to make to you, our highly valued customer. First, especially in today's marketplace, IDS Telecom Corp., a Cleartel Communications company is committed to meeting the highest possible customer service standards.

Second, we can assure you that the hundreds of fine employees at IDS Telecom Corp. are committed to providing our customers with the best in telecommunications quality and services. Additionally and perhaps most importantly, Cleartel has the experience and resources to ensure that IDS Telecom Corp. meets your telecommunications needs. Cleartel Communications is a national Competitive Local Exchange Carrier, operating in over twenty nine states. Our mission is providing exceptional value through superior customer support and advanced services.

It's also important for you to know:

- The services you have paid for will not be impacted as a result of this agreement.
- Your existing rates and charges will not be changed as a result of this transaction.
- You will still pay for/renew your services in the same way you do today.

We recognize that you have the right to choose your telephone service provider. If you do choose another provider you may incur installation or carrier change charges. If you stay with Old IDS, however, you will not incur any such charges for the transfer to IDS Telecom Corp. Further, you will not need to take any action for the transfer to IDS Telecom Corp. to occur. (Additionally we will maintain any preferred carrier freeze you may have)

If you have any questions about this notice or problems with your current service, please call IDS at 1-888-707-6580. To ensure a seamless transition of service, please note that IDS Telecom Corp. intends to keep that same number after the transition.

We appreciate your business and your commitment to IDS during this transitional time. The future looks bright as we move forward with new bundled local/long distance products, Internet services including web hosting and broadband Internet solutions to residential and business customers.

Sincerely,

IDS Telecom Corp.

IDS Telecom, LLC